

equitable tolling of either time limit. For the following reasons, the Court grants Defendant's motion.

I. Factual Background²

Plaintiff was employed as an administrative assistant with Defendant from October 17, 1992 to September 24, 2001. She alleges that, as the only female employee in the manufacturing division, she was subjected to sexual discrimination, sexual harassment, and a hostile work environment while in Defendant's employ. Defendant's employees and supervisors allegedly groped and assaulted her on multiple occasions, despite her repeated complaints. Plaintiff alleges that the foreman groped her repeatedly, exposed himself to her, called her a "crackwhore," asked for sexual favors, taunted her with pornography in front of co-workers, spread rumors as to her sexual promiscuity, and instructed other employees to grope her. In the final alleged incident before Plaintiff was laid off, the foreman grabbed Plaintiff's breasts, pushed her against a wall, and groped between her legs. She also claims that paperwork and personal belongings were removed from her desk, the janitorial staff refused to clean her work area, and her office furniture was moved to make her work more difficult.

Plaintiff alleges that two official employment actions were taken against her based on her gender. On August 15, 2001, she was allegedly denied a promotion to the forklift driver position, and on September 24, 2001 she was laid off. Defendant stated the reason for her dismissal was company reorganization, but Plaintiff argues that it was due to sex discrimination and in retaliation for her complaints of sex discrimination. Despite Plaintiff's complaints to higher level management, Defendant allegedly took no steps to stop or remedy the offending conduct.

²Facts are taken from the Complaint, Plaintiff's Deposition on September 3, 2003 and its attached Exhibits, and Defendant's Memorandum in Support of Motion for Summary Judgment.

Plaintiff brought her grievances to the EEOC and retained Stuart Breakstone as her attorney. Plaintiff has been represented by Mr. Breakstone since at least December 3, 2002. At his request, the EEOC issued a Right to Sue letter, dated December 12, 2002. In her deposition, Plaintiff claimed that she received the letter on January 17, 2003, though she offered no facts to substantiate her contention. She filed her complaint with this Court on April 16, 2003.

Defendant filed its motion for summary judgment on September 18, 2003. Plaintiff has not responded to date, though Local Rule 7.2 requires a response within thirty days.

II. Legal Standard

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In other words, summary judgment is appropriately granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The party moving for summary judgment may satisfy its initial burden of proving the absence of a genuine issue of material fact by showing that there is a lack of evidence to support the nonmoving party’s case. Id. at 325. This in turn may be accomplished by submitting affirmative evidence negating an essential element of the nonmoving party’s claim, or by attacking the opponent’s evidence to show why it does not support a judgment for the nonmoving party. 10a Charles A. Wright et al., Federal Practice and Procedure § 2727, at 35 (2d ed. Supp. 1996).

Facts must be presented to the court for evaluation. Kalamazoo River Study Group v.

Rockwell Int'l, 171 F.3d 1065, 1068 (6th Cir. 1998). The court may consider any material that would be admissible at trial. 10a Charles A. Wright et al., Federal Practice and Procedure § 2721, at 40 (2d ed. 1983). Although hearsay evidence may not be considered on a motion for summary judgment, Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 927 (6th Cir. 1999), evidentiary materials presented to avoid summary judgment otherwise need not be in a form that would be admissible at trial. Celotex, 477 U.S. at 324; Thaddeus-X v. Blatter, 175 F.3d 378, 400 (6th Cir. 1999).

In evaluating a motion for summary judgment, all the evidence and facts must be viewed in a light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Walbourn v. Erie County Care Facility, 150 F.3d 584, 588 (6th Cir. 1998). Justifiable inferences based on facts are also to be drawn in favor of the non-movant. Kalamazoo River, 171 F.3d at 1068.

Once a properly supported motion for summary judgment has been made, the “adverse party may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586.

III. Analysis

A. Title VII Claims

Under Title VII, when the EEOC issues a Right to Sue (“RTS”) notice to a complainant,

“within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge...by the person claiming to be aggrieved.” 42 U.S.C. § 2000e-5 (2003). A civil action against the respondent named in the charge must be brought within ninety days of receipt of the RTS letter or it is time-barred. Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 149 (1984). “The Sixth Circuit has resolved that notice is given, and hence the ninety-day limitations term begins running, on the fifth day following the EEOC’s mailing of a RTS notification to the claimant’s record residential address, by virtue of a presumption of actual delivery and receipt within that five-day duration.” Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 557 (6th Cir. 2000). Furthermore, the Sixth Circuit has concluded that a claimant’s limitations period begins running before receipt of the RTS notice if the claimant has constructive knowledge of the notice’s issue. See Cook v. Providence Hosp., 820 F.2d 176 (6th Cir. 1987) (holding a claimant’s actual receipt of the RTS notice immaterial when she knew that the notice had been issued).

The EEOC issued and mailed Plaintiff a RTS Notice to her correct residential address on December 12, 2002. Plaintiff filed her complaint on April 16, 2003, which is 125 days after the EEOC issued and mailed her RTS notice. Given the five day receipt presumption, this is thirty days after the expiration of her ninety-day limitations period. She presents no evidence to show that the letter took thirty-five days to get to her home. Moreover, she admits to receiving notice directly from her EEOC representative that the notice was issued. (Pl.’s Depo. at 62-63.) Therefore, Plaintiff’s Title VII claims were not filed on time and may only proceed if the Court finds that the limitations period should be equitably tolled.

Title VII’s ninety-day filing requirement is not a “jurisdictional requirement, but, instead, is

a timing requirement similar to a statute of limitations, subject to waiver, estoppel, and equitable tolling.” Truitt v. County of Wayne, 148 F.3d 644, 646-47 (6th Cir. 1998). “Absent compelling equitable considerations, a court should not extend limitations by even a single day.” Graham-Humphreys, 209 F.3d at 562. The Sixth Circuit identified five factors to consider in determining the appropriateness of equitable tolling: “1) lack of notice of the filing requirement; 2) lack of constructive knowledge of the filing requirement; 3) diligence in pursuing one's rights; 4) absence of prejudice to the defendant; and 5) the plaintiff's reasonableness [in] remaining ignorant of the particular legal requirement.” Truitt, 148 F.3d at 648 (refusing to toll filing period in Title VII case when plaintiff waited 120 days after denial of in forma pauperis petition to pay filing fee, thereby allowing 143 days to elapse after receiving right to sue letter). That list is not exhaustive, however, and each factor may not be material in every case. See Graham-Humphreys, 209 F.3d at 561. Equitable tolling is determined on a case-by-case basis. Truitt, 148 F.3d at 648. Equitable tolling applies typically when a litigant's failure to meet a legally mandated deadline unavoidably arose from circumstances beyond the litigant's control. Baldwin County, 466 U.S. at 151.

The Court considers each of the five factors. First, Plaintiff was represented by counsel during the relevant time period and therefore is deemed to have notice of the filing requirement. Jackson v. Richards Med. Co., 961 F.2d 575, 579 (6th Cir. 1992). Second, Plaintiff admitted to having actual knowledge of the ninety-day filing period from the RTS notice and speaking with the EEOC about it. (See Pl.'s Depo. 62-63.) While Plaintiff might have received the benefit of the doubt if she were proceeding pro se, Plaintiff was represented by counsel for all relevant portions of this case's progression. Had Plaintiff filed a civil action immediately upon retaining counsel, the equities might favor an extension of the time period. Plaintiff, however, months after hiring Mr.

Breakstone to file this Complaint, during which time she was continuously represented. Regarding the third factor, Plaintiff puts forth no reason for her lack of diligence in her claims. When asked why she waited until April 16, 2003 to file suit, she answered, “[t]hat’s how long it took to get everything together.” (Pl.’s Depo. at 72.) When asked whether there were any other reasons or extenuating circumstances, she replied in the negative. (Id. at 73.) The fourth factor tends to Plaintiff’s favor, since a month’s time does not obviously prejudice Defendant’s ability to defend against Plaintiff’s claims, and Defendant makes no argument to that effect. Fifth, Plaintiff has failed to show a reasonable reason for failing to meet the filing deadline.

A court may not toll a filing deadline solely for an absence of prejudice. See Andrews v. Orr, 851 F.2d 146, 151 (6th Cir. 1988) (holding that absence of prejudice is not an independent basis for invoking the equitable tolling doctrine). Defendant’s alleged behavior is shocking, yet procedural requirements established by Congress for gaining access to federal court are not to be disregarded by the Court out of sympathy alone. See Baldwin County, 466 U.S. at 152. Plaintiff has failed to argue that circumstances beyond her control kept her from filing her complaint. Plaintiff has failed to show a genuine issue of material fact as to her Title VII claims’ timeliness. Accordingly, Defendant is granted summary judgment on Plaintiff’s Title VII claims.

B. State Claims

The rest of Plaintiff’s claims are subject to one-year statutes of limitations. See Tenn. Code Ann. § 4-21-311(d) (2003) (Tennessee Human Rights Act claims must be filed within one year after discriminatory practice ceases); Tenn. Code Ann. § 28-3-104(a) (2003) (under Tennessee law, § 1983 claims and personal tort actions subject to one year statute of limitations); George v. Aventis Pharm., Inc., 252 F. Supp. 2d 599, 607 (W.D. Tenn. 2003) (same). The last discriminatory incident

alleged was on September 24, 2001, more than one year before Plaintiff filed her complaint.

Plaintiff's state claims are therefore time-barred unless the Court determines that equitable tolling is appropriate. There seems to be no lack of knowledge that the statute was running. Negligence on the attorney's part is not a sufficient reason for tolling. See Johnson v. U.S. Postal Serv., 64 F.3d 233, 238 (6th Cir. 1995). This is not a case where Plaintiff was diligent in preserving her rights. See Irwin v. Dep't. of Veteran Affairs, 498 U.S. 89, 96 (1990) ("We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."). Plaintiff did not file any sort of document, even a defective pleading, with the Court in that time. See id. ("We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period..."). This extended delay represents a significant lack of diligence.

_____The Court finds the balance of the equities does not weigh in favor of tolling, particularly given Plaintiff's extensive delay in filing suit on her state claims. Plaintiff has failed to create a genuine issue of material fact as to the timeliness of her state claims. Therefore, Defendant's motion for summary judgment is granted on Plaintiff's state claims.

IV. Conclusion

All of Plaintiff's claims are time-barred under the applicable statutes, and the Court finds that this is not an appropriate case for equitable tolling. Therefore, the Court **GRANTS** Defendant's motion for summary judgment.

IT IS SO ORDERED this _____ day of _____ 2003.

BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE